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OCT 19 1906
JAMES H. McKENN

No. 13.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

J. U. McKENDREE.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, KENTUCKY.

BRIEF FOR THE UNITED STATES.

(Filed at the suggestion of the Court.)

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IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, KENTUCKY.

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(Filed at the suggestion of the Court.)

Before discussing the questions raised on this record as to the constitutionality of the act of Congress of February 2, 1903 (32 Stat., 791), and the regulations made by the Secretary of Agriculture in pursuance thereof, we wish to call the attention of the court to the peculiar situation disclosed by the record as to the matter of its jurisdiction on writ of error to the State court, and especially to certain phases thereof supplementary to the points made in the suggestion of want of jurisdiction heretofore filed.

In our view the amended answer (R., 3–4) discloses the only Federal questions properly to be

considered in determining the matter of jurisdiction. Those questions, as therein asserted by defendant, are: 1. The constitutionality of the act of Congress of February 2, 1903, and the regulations of the Secretary made in pursuance thereof. 2. Defendant's alleged "right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

As the State court sustained the validity of the act of Congress and the regulations of the Secretary, this court can not, under section 709, Revised Statutes, review its decision on the ground that that question was involved.

Assuming for the purpose of the argument that the defendant's further claim of a right, privilege, and immunity under the Constitution of the United States to be exempt from suit or liability under such alleged unconstitutional and void act and regulations properly raises a distinct question under the Constitution and laws of the United States from that made by the allegation of the unconstitutionality of the act and regulations, still this court would be without jurisdiction to review this case under section 709, Revised Statutes, because the decision of the State court was not *against* the right, privilege, and immunity so set up and claimed. The State court did not hold

that the defendant was subject to suit or liability under an act of Congress and regulations made in pursuance thereof which were unconstitutional and void. It could not have so held without holding the act and regulations unconstitutional and void, whereas it held that they were constitutional and valid. Therefore, in this case also the requirement of section 709, Revised Statutes, that the decision of the State court be *against* the right, privilege, or immunity specially set up and claimed, in order to authorize the issuance of a writ of error from this court, is not complied with.

This disposes of the only Federal questions properly raised in the State court. Another question is, however, sought to be injected into the case thru the certificate of the judge. (R., 10.) That certificate, after setting forth the defendant's claim as to the unconstitutionality of the act of Congress of February 2, 1903, and the regulations and orders of the Secretary offered in evidence in behalf of the plaintiff, recites:

> Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said

regulations or orders on the ground that
said regulations or orders did not assum
attempt to give, and that the said ac
Congress did not assume or attempt to g
to the plaintiff herein or to any other in
situation a remedy by way of civil ac
against the defendant herein for its alle
breach of any of said regulations
or orders made or promulgated by the Se
tary of Agriculture, and throughout the
of said action the defendant, Illinois Cen
Railroad Company, specifically set up
claimed even if said act of Congress and
regulations and orders were valid under
Constitution and laws of the United Sta
still it had a right, privilege, or immu
under the said act of Congress or the
regulations or orders from any liabilit
the plaintiff, J. U. McKendree, in a
action for damages claimed on accoun
its alleged breach of said regulations
orders.

It will be observed that no reference is mad
the certificate of the judge to the alleged rig
the defendant, under the Constitution of
United States, to be exempt from prosecu
under an unconstitutional statute and regulati
set up in the answer. The reason for this omis
is obvious. The judge could not certify, as c
sel for defendant well knew, that the court
decided against the right so set up and clai
because the court had held the statute
regulations constitutional, and all that was

judged against defendant was that he was liable for special damages occasioned the plaintiff thru his violation of a constitutional act and regulations. If, therefore, the defendant was to obtain a review of the case by this court, it must be upon some other ground; and so we have an entirely new question injected into the case, as to the right of the defendant under said act of Congress, *assuming it to be constitutional*, to be exempt from liability to the plaintiff "in a civil action for damages claimed on account of its alleged breach of said regulations or orders." It is sought to bolster up the question so raised by like allegations in the assignments of error (R., 12–15) and in the stipulation made in this court as to the Federal questions upon which parties wish to have this case determined (R., 45, 46), the original question as to the constitutional right of the defendant to be exempt from prosecution under an unconstitutional statute and regulation, set up in the answer, being allowed to drop away entirely.

We submit that, under the decisions of this court, the alleged Federal question referred to in the certificate was not raised in the court below "at the proper time and in the proper way."

Speer v. *Illinois*, 123 U. S., 181.
Lawler v. *Walker*, 14 How., 152.
Brooks v. *Missouri*, 124 U. S., 394.
Leeper v. *Texas*, 139 U. S., 467.
Powell v. *Brunswick County*, 150 U. S., 439.

Dibble v. *Bellingham Bay Land Company*, 163 U. S., 69, 70.

Yazoo and Mississippi Railroad Co. v. *Adams*, 180 U. S., 41.

In *Powell* v. *Brunswick County* the court said (150 U. S., 439):

> The determination of the jurisdiction of this court to review the judgment of a State court under section seven hundred and nine of the Revised Statutes necessarily devolves upon the court itself, and, while the certificate of the presiding judge of the State court as to the existence of the state of case upon which our interposition may be successfully invoked is always regarded with respect, it can not confer jurisdiction upon this court to reexamine the judgment below. (*Lawler* v. *Walker*, 14 How., 149; *Railway Company* v. *Rock*, 4 Wall., 477; *Parmelee* v. *Lawrence*, 11 Wall., 36; *Caperton* v. *Bowyer*, 14 Wall., 216; *Brown* v. *Atwell*, 92 U. S., 327; *Gross* v. *United States Mortgage Co.*, 108 U. S., 477; *Feliz* v. *Scharnweber*, 125 U. S., 54; *Roby* v. *Colehour*, 146 U. S., 153.)
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> In *Parmelee* v. *Lawrence*, Mr. Justice Nelson, speaking for the court, said: "We will add, if this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more cer-

tain and specific what is too general and indefinite in the record, *but is incompetent to originate the question* within the true construction of the 25th section."

In *Chapin* v. *Frye* (179 U. S., 127) this court held that "where a Federal question is raised in the State court, the party who brings the case to this court can not raise here another Federal question which was not raised below."

This ruling applies not only to the question sought to be raised by the certificate of the judge, but to the question sought to be raised by the reference in the brief for defendant to section 5258, Revised Statutes.

Moreover, we submit that the alleged Federal question sought to be raised by the certificate is not substantial and real, but entirely fictitious and without color or ground to support it. The claim is that defendant has a right, *under the act of February 2, 1903*, to be exempt from liability to the plaintiff in a civil action for damages inflicted upon him as a result of its breach of the regulations and orders made in pursuance of said act, assuming the same to be valid. Upon what provision of that statute does defendant rely in support of this claim? The act in question does not refer to the matter of private rights of action at all, as the defendant in his brief (p. 45) observes. But, he says, "the only sanction for enforcement of the act of Congress, or regulations of the Secretary of Agriculture aforesaid which Congress has provided is

the penalty of fine and imprisonment." Assuredly that is true; but the plaintiff in this case was not endeavoring to enforce said act or regulations. He was only seeking to recover for the injury to his cows occasioned by the wrongful action of the defendant. The act and regulations referred to were merely relied on as proof of the defendant's negligence, plaintiff's right to bring a civil action to recover for the injury inflicted upon him by the defendant's negligence *depending entirely upon the law of the State in regard to such actions.*

It is true Congress might have provided, as it did in the act to regulate commerce, that parties injured thru a violation of the act in question might have a remedy in the courts of the United States. But, as stated, it did not deal with the subject of private rights of action at all, and left parties who might be injured thru a violation of the act to their remedies under the State or local law. This being so, there is no foundation whatever for the claim that defendant is entitled, *under the act*, to be exempt from suit or liability to the plaintiff for the damage done him thru his violation thereof.

In this connection the court's attention is called to a misleading statement in the certificate of the judge. It is there stated that "the claims of the plaintiff herein were established solely by reason of the defendant's alleged breach of said regula-

tions and orders." (R., 11.) If this were true, as thus baldly stated, there would be some foundation for defendant's claim that he is exempt under the act from a civil suit for a breach of said regulations and orders. But of course the court did not hold that the plaintiff was entitled to recover for the loss of his cows simply because the defendant had violated said regulations and orders. It required the plaintiff to prove to the satisfaction of the jury not only that the cattle brought by the defendant into the town of Arlington, Kentucky, from Grand Junction, Tennessee, in violation of said regulations and orders, were infected with Texas fever, but that his (plaintiff's) cows caught such disease from said cattle and died therefrom. This is explicitly stated in the instructions which the court gave the jury of its own motion, as well as in the instruction given them upon defendant's motion. (R., 9.) It was because only of the special damage occasioned the plaintiff by the defendant's breach of said regulations and orders that plaintiff was allowed to recover.

Defendant's alleged right, under the act of February 2, 1903, to be exempt from a civil action by an individual for special damages occasioned him by a violation of the regulations of the Secretary of Agriculture made in pursuance thereof, is therefore clearly frivolous and fictitious, and made solely for the purpose of obtaining a review by this court of the constitutional questions involved.

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In *Hamblin* v. *Western Land Co.*, 147 U. S., 531, 533, the court said:

> A real, not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of State courts. (*Millingar* v. *Hartupee*, 6 Wall., 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, 87.) In the latter case it was said that "the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In any view, therefore, the court has no jurisdiction of this case, and the writ of error should be dismissed.

These jurisdictional defects have been thus earnestly urged upon the court, because since the passage of the act of March 3, 1905 (33 Stat., 1264), the questions arising under the act of February 2, 1903, have become academic merely, and it was thought the court would not desire to discuss them, involving as they do such important principles of constitutional law, unless it was absolutely necessary to do so.

Act of February 2, 1903, c. 349 (32 Stat., 791):

AN ACT To enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot and mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," approved May twenty-nine, eighteen hundred and eighty-four (twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe

such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot-and-mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purpose of such inspection.

SEC. 2. That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States, or from one State or Territory of the United States or the District of Columbia to an-

other, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia, whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

SEC. 3. That any person, company, or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

Approved, February 2, 1903.

Act of May 29, 1884, c. 60 (23 Stat., 31):

AN ACT For the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Agriculture shall organize in his Department a Bureau of Animal Industry, and shall appoint a chief thereof, who shall be a competent veterinary sur geon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and

also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the chief of said Bureau shall be three thousand dollars per annum; and the Commissioner shall appoint a clerk for said Bureau, with a salary of one thousand five hundred dollars per annum.

SEC. 2. That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases. The compensation of said agents shall be at the rate of ten dollars per diem, with all necessary expenses, while engaged in the actual performance of their duties under this act when absent from their usual place of business or residence as such agent.

SEC. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as may deem necessary for the speedy

and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to cooperate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State, or other properly constituted authorities, signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigation, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

SEC. 4. That in order to promote the exportation of live stock from the United States, the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to

the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

SEC. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures not inconsistent with the provisions of this act as he may deem necessary.

SEC. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*,

That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

SEC. 7. That it shall be the duty of the Commissioner of Agriculture to notify in writing the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any inflected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

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ARGUMENT ON THE MERITS.

I.

The act of February 2, 1903, so far as it is necessary to be considered, is constitutional and valid.

In their discussion of certain general provisions of the act in question, counsel for plaintiff in error have utterly ignored the only provisions applicable to this case, and which it is necessary to consider on this record.

After conferring upon the Secretary of Agriculture the powers conferred upon the Secretary of the Treasury by sections 4 and 5 of the act of May 29, 1884, in order to enable him "to effectually suppress and extirpate contagious pleuro-pneumonia, foot-and-mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases," section 1 of the act of February 2, 1903, provides:

> He is hereby authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of live stock *from any place within the United States where he may have reason to believe such diseases may exist* into and through any State or Territory, including the Indian

> Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported *from such locality* to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot-and-mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and thru any State or Territory, including the Indian Territory, and into and thru the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purpose of such inspection.

Here is specific authority to the Secretary of Agriculture to do as he did in B. A. I. order, No. 107, dated March 13, 1903 (R., 25), namely, designate an area within the United States which he believed to be infected, and make rules and regu-

lations concerning the transportation of cattle therefrom in interstate or foreign commerce.

There is no unconstitutional delegation of authority in this. In furtherance of the clearly exprest purpose of the act, that the spread of contagious and infectious diseases of live stock should be effectually suppressed, Congress authorized the Secretary of Agriculture to make rules and regulations concerning the transportation in interstate and foreign commerce of live stock coming from places within the United States which he believed to be infected, *and declared that such rules and regulations should have the force of law*. In necessary effect this was a prohibition upon the transportation in interstate or foreign commerce of cattle coming from such infected areas, except in accordance with the rules and regulations prescribed by the Secretary.

The act of February 2, 1903, as appears from its legislative history (36 Cong. Rec., 248, 270, 366, 664, 1264), was past immediately in response to the situation disclosed in *Reid* v. *Colorado* (187 U. S., 137), decided December 1, 1902, in which it was held, contrary to what had been supposed to be the fact, that the act of May 29, 1884, did not cover the whole subject of the transportation of live stock in interstate commerce, and therefore, notwithstanding that act, the State might legislate for its protection against the introduction of diseased cattle.

In introducing the bill Mr. Wadsworth, from the

Committee on Agriculture, submitted the following report (2d, 248):

The Committee on Agriculture, to whom was referred the bill (H. R. 15922) making an appropriation for the suppression, and to prevent the spread, of contagious and infectious diseases of live stock, and for other purposes, submit the following report:

The only object of the first section of this bill is to carry out the intention of Congress when it established the Department of Agriculture as a Department of the Government and gave it all the powers over this question of dealing with infectious diseases of cattle and other animals.

When the present Department of Agriculture was made a Cabinet position it was intended to transfer all the powers then vested in the Commissioner of Agriculture to the Secretary of Agriculture, but it seems that at that time the power to make regulations governing the transportation of animals in interstate commerce lay in the hands of the Secretary of the Treasury and not in the Commissioner of Agriculture.

This fact seems to have been overlooked when the act changing the title of the head of the Department of Agriculture from "Commissioner" to "Secretary" and making him a Cabinet officer was passed and has since been absolutely ignored and lost sight of. And during the past ten or twelve years the Secretary of Agriculture has made all rules and regulations and issued all certificates of inspection permitting the transportation of animals from infected regions,

and the legality of this action has never been questioned until lately, when the question arose in a suit brought by a shipper of cattle from Texas against the State of Colorado.

This State had passed a law ordering all cattle brought within its borders, or passing through it, to be subjected to a State inspection and a charge of fees for said inspection and the attendant labor. The shipper refused to pay, was arrested, found guilty under the laws of Colorado, sentenced to six months' imprisonment and to pay a fine of two or three hundred dollars. He sued out a writ of error in the Supreme Court of the United States, from which court an opinion was handed down December 1, 1902. The Supreme Court of the United States affirmed the supreme court of Colorado on the ground that the act creating the Bureau of Animal Industry only went to the extent of providing for the suppression and extirpation of contagious diseases of animals and did not contemplate the issue of certificates by the Secretary of Agriculture (through the Bureau of Animal Industry), and pointing out the fact that the act making a Cabinet officer of the Secretary of Agriculture did not transfer to him the authority (which was then vested in the Secretary of the Treasury) to make rules and regulations regarding the inspection and transportation of animals for interstate commerce.

As stated above, this power has been exercised for the last past ten or twelve years by the Secretary of Agriculture, who has a

force of competent men to carry on this work, while the Secretary of the Treasury has none. It is simply to carry out the evident intention of Congress that this section is inserted in this bill. It is known to all that a very serious outbreak of foot-and-mouth disease has lately occurred in two or three of the New England States.

Experience in dealing with this disease in the countries of Europe shows conclusively that there is but one way to thoroughly extirpate it, and that is by slaughter of every herd infected and every herd which has been exposed to the contagion and the thorough disinfection of stables, cars, and premises of all kinds which may have been occupied by infected animals.

Your committee considers this outbreak of foot and mouth disease (which disease has practically never existed before in this country) the most serious menace to our live-stock interests, the vast magnitude of which will be appreciated when the attention of the House is called to the fact that last year live stock to the value of $46,000,000 and animal products to the value of almost $1,000,000,000 were exported from the United States.

Should any hesitancy be shown on our part in our efforts to stamp out this disease, Europe might make it a pretext to quarantine against our animals and animal products, and the loss to our agricultural industries by such action would be beyond calculation.

> Your committee therefore urges upon the House the immediate passage of the bill.

The bill as introduced appropriated $1,000,000 for the purposes referred to, but the House eliminated the appropriation feature and considered it merely as a matter of legislation. (Id., 270.)

The bill as it past the House was reported to the Senate with an amendment of its title, necessitated by the elimination of the appropriation, and the insertion of the penalty provision as section 3. The Senate committee adopted the House report above set forth as their report, and recommended the passage of the bill as amended. (Id., 1264.)

The debate in the House (the bill past the Senate without discussion) shows that it was clearly understood that the effect of the provision of section 1, above quoted, would be to place the matter of the interstate transportation of live stock from the infected areas of the South entirely under the control of the Federal authorities, to the absolute exclusion of the State. This was unmistakably brought out by the opposition of Mr. Gaines, of Tennessee, to the provision of that section in regard to the issuance of inspection certificates by officers of the Bureau of Animal Industry, and the effect thereof, in the case of cattle about to be shipped, driven, or transported "from such locality"—that is, "from any place within the United States where he [the Secretary of Agriculture] may have reason to believe such diseases may

exist," referred to in the preceding sentence—into and through any State or Territory, etc. Mr. Gaines insisted, and the proponents of the measure agreed, that the effect would be absolutely to exclude the jurisdiction of the State over cattle so transported as long as they remained subjects of interstate commerce. (Id., 366 et seq.)

The act of February 2, 1903, having been past, therefore, in the light of the limitations of the act of May 29, 1884, so clearly set forth by Mr. Justice Harlan in his opinion in *Reid* v. *Colorado*, it seems absurd to say, as counsel for plaintiff in error contend—in the face of the provision in that act expressly authorizing the Secretary of Agriculture to establish rules and regulations concerning the exportation and transportation in interstate commerce of live stock from infected places within the United States, and giving such rules and regulations the force of law, besides adding a penalty for their violation—that Congress has not gone beyond the prohibition contained in the act of 1884 upon the transportation in interstate commerce of *diseased* cattle.

In *Reid* v. *Colorado* the court pointed out that in the act of 1884 Congress did not assume to declare that "the rules and regulations which the Department might adopt as necessary 'for the speedy and effectual suppression and extirpation of said diseases' should have in themselves, or apart from the action of the State, any binding force upon the State;" that only the power of suggestion and

cooperation was given, and that "if the authorities of any State adopted the plans and methods devised by the Department, or if the State authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigation and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or Territory into another." (187 U. S., 147, 148.)

If it was not to meet the weakness in the act of May 29, 1884, thus disclosed that Congress inserted in the act of February 2, 1903, the provision authorizing the Secretary of Agriculture to make such rules and regulations concerning the exportation and transportation in interstate commerce of live stock from infected places, and declared that such rules and regulations should have the force of law, it is difficult to see for what purpose that provision was adopted.

The power conferred upon the Secretary to make rules and regulations concerning the transportation in interstate and foreign commerce of live stock coming from infected areas within the United States is plainly only administrative. The case is well within the principle recognized and applied in *Buttfield* v. *Stranahan*, 192 U. S., 470. In that case the court sustained an act of Congress which simply forbade, in broad terms, the importation of tea inferior in purity, quality, and fitness

for consumption to the standards authorized to be fixt by the Secretary of the Treasury. The court there said (p. 496):

> The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark* (143 U. S., 649), where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on

> the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

The tea act prohibited the importation of tea below the standards authorized to be fixt by the Secretary of the Treasury. The act in question in effect forbids the transportation in interstate commerce of cattle coming from an infected place within the United States contrary to the rules and regulations authorized to be prescribed by the Secretary of Agriculture. In each case Congress laid down the fundamental rule to be observed, leaving administrative details to be worked out by executive officers.

The Government does not contend that under the general authority conferred upon the Secretary of Agriculture by other provisions of the act to make "rules and regulations" and "take such measures as he may deem proper," to prevent the spread of contagious and infectious diseases of live stock, that officer was authorized, or could constitutionally be authorized, to make the regulations here in question. We rest those regulations upon the specific authority contained in the provisions

of section 1 above quoted, in which Congress indicated the plain rule of law that was to be observed, namely, that no live stock was to be transported from places within the United States ascertained by the Secretary of Agriculture to be infected with the contagious diseases referred to, except in accordance with the rules and regulations which he was authorized to prescribe.

As to our attitude in regard to the general authority conferred upon the Secretary to make "rules and regulations," etc., we respectfully refer the court to the opinion of the present incumbent of the office of Attorney-General, rendered September 26, 1904, not yet published, but which will be reported in Twenty-fifth Opinions Attorneys-General, page 249. For the convenience of the court a copy of said opinion is appended. In that opinion, it will be observed it was held that the authority conferred upon the Secretary by such general provisions "must be construed to mean simply that he make such regulations and take such measures, in his discretion, for the purpose mentioned, as are *administrative* in their nature—that is, for the enforcement of existing law;" that "it is not to be assumed that Congress intended to exceed its constitutional authority and delegate to him legislative power," the well-settled rule being "that an act of Congress should, if possible, be given an interpretation that will make it consistent with

the Constitution"—citing *Parsons* v. *Bedford* (3 Pet., 448); *Presser* v. *Illinois* (116 U. S., 269); *Hooper* v. *California* (155 U. S., 657). It was therefore held that "since a prohibition upon importation is not made or directed by the legislation referred to as a means for preventing the introduction and dissemination of the diseases of animals, the order of your Department prohibiting the importation of hay and straw from continental Europe is an exercise of legislative power and void."

In this case it will be observed the Secretary is expressly authorized and directed to make rules and regulations concerning the transportation in interstate commerce of live stock coming from places within the United States which he believes to be infected with the diseases referred to. The distinction between the two cases is obvious.

It is unnecessary to consider in this case the question raised by counsel for plaintiff in error as to whether Congress did or could, in section 3 of the act of February 2, 1903, make a violation of the rules and regulations in question a criminal offense, since this is not a criminal prosecution to enforce the penalty clause of the act. As indicated in stating the history of this legislation, section 3 was not in the bill as it passed the House, but was inserted by the Senate. Irrespective of that clause, Congress plainly could and did, in the provision in question, give to such regulations the force of law, and thereby made it unlawful, if not criminal,

to violate them. Nevertheless we think that Congress has in this case plainly enunciated its purpose that a violation of the rules and regulations prescribed by the Secretary of Agriculture in execution of the duty enforced upon him by section 1 to provide rules and regulations concerning the transportation in interstate and foreign commerce of cattle away from an infected area, should be a criminal offense, and that this was within its power. (*In re Kollock*, 165 U. S., 526.)

II.

The regulations of the Secretary of Agriculture, being confined to the subject of interstate commerce, were constitutional and valid.

It is contended that the regulations made by the Secretary of Agriculture were void because the quarantine line fixt by him was not confined to the boundaries of the State.

It is clearly immaterial whether a quarantine line established by Congress or under its authority for the regulation of interstate commerce runs thru the center of a State, so long as interstate transportation is alone intended to be affected. It may even be said that in order adequately to police and protect interstate commerce Congress may regulate and control intrastate commerce going thru the channels of interstate commerce. That question is not, however, presented in this case, since, in the provision of section 1 of the act of

February 2, 1903, above quoted, Congress only directed the Secretary of Agriculture to make rules and regulations covering the transportation in interstate commerce and foreign commerce of live stock coming from infected areas, and the regulations of the Secretary, properly construed, are also limited to interstate transportation.

In the original order of March 13, 1903 (R., 25), it will be observed, the quarantine line established by the Secretary of Agriculture was confined to State boundaries, hence interstate commerce alone was regulated thereby.

That order also contained these provisions:

> Whenever any State or Territory located above or below said quarantine line, as above designated, shall duly establish a different quarantine line, *and obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said State or Territory*, and said last above-mentioned line *and the measures taken to enforce it* are satisfactory to the Secretary of Agriculture, he may, by a special order, temporarily adopt said State or Territory line.
>
> Said adoption will apply only to that portion of said line specified and may cease at any time the Secretary may deem it best for the interest involved, and in no instance shall said modification exist longer than the period specified in said special order; and at the expiration of such time said quarantine line shall revert without further order to the line first above described.

> Whenever any State or Territory shall establish a quarantine line for above purposes, differently located from the above-described line, *and shall obtain by legislation the necessary laws to enforce the same completely and strictly*, and shall desire a modification of the Federal quarantine line to agree with such State or Territory line, the proper authorities of such State or Territory shall forward to the Secretary of Agriculture a true map or description of such line and a copy of the laws for enforcement of same, duly authenticated and certified.

It is plain from this language that in providing for the adoption of the State quarantine line *as the Federal line* the Secretary was proceeding with a clear recognition of the fact that the regulation of intrastate commerce was not within the scope of his authority, but belonged to the State; hence the requirement that the State or Territory establishing a different quarantine line should "obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said State or Territory," and that said line "and the measures to be taken to enforce it" should be satisfactory to the Secretary of Agriculture before it would be adopted by him as the Federal line. In other words, what the Secretary evidently had in view was this: "With the Federal quarantine line fixt at the boundary of a State, all commerce going over it is interstate, and therefore subject to the regu-

lations provided by me in accordance with the direction of Congress. But if the line be changed so as to run thru the State, part of the commerce going over such line will be local and part interstate, and the local commerce is not under my control. Unless, therefore, the State 'obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of the State,' I can not, in the interest of interstate commerce, afford to adopt it as the Federal line."

Clearly, therefore, by necessary implication from the language used, the rules and regulations prescribed by the order in question were intended to apply, in case the quarantine line should be changed so as to run thru a State, only to interstate commerce, as in the case of the original line.

This, we are advised by the Agricultural Department, was the practical interpretation put upon said order and its amendments. In the present case, it will be observed, the cattle in question were brought from Grand Junction, Tennessee, a point below the quarantine line, to Arlington, Kentucky, and hence were being transported in interstate commerce.

It would be as fair to say that by the adoption of the State quarantine line as the Federal line the Secretary intended the State should regulate interstate commerce within its limits, as that he intended thereby to control intrastate commerce.

It is of prime importance that the Federal Government be allowed to adopt a quarantine line running thru a State under a reciprocal arrangement, such as was here contemplated, as to its enforcement by the State with respect to intrastate commerce and by the Federal Government as to interstate commerce, else it will be necessary to maintain its line upon the State boundary and quarantine a larger area than may be desired. Thru the efforts made by the Agricultural Department under this and other laws the infectious diseases referred to are being confined into narrower and narrower areas, and the quarantine line is gradually moving south. It would be unfortunate, indeed, if in order effectively to reach a small infected area within a State the whole State would have to be quarantined.

It is respectfully submitted that the only provision of section 1 of the act of February 2, 1903, involved in this case, and the regulations of the Secretary made in pursuance thereof, were constitutional and valid.

WILLIAM H. MOODY,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

APPENDIX.

OPINION OF THE ATTORNEY-GENERAL REFERRED TO IN BRIEF.

DEPARTMENTAL REGULATION—DELEGATION OF LEGISLATIVE AUTHORITY.

The order of the Department of Agriculture of April 26, 1904, prohibiting the importation of hay and straw from continental Europe as a means of preventing the introduction of foot and mouth disease among cattle in the United States, is a regulation of commerce with foreign nations and an exercise of legislative power, and therefore void.

The act of February 2, 1903 (32 Stat., 791), merely authorizes the Secretary of Agriculture to make such regulations and take such measures as are administrative in their nature for the enforcement of the purposes of that law.

DEPARTMENT OF JUSTICE,
September 26, 1904.

SIR: Your letter of July 12, 1904, presents the question whether the following order promulgated by your Department is authorized by law:

[B. A. I. Order No. 124.]

"*Prohibition of the importation of hay and straw from continental Europe.*

"U. S. DEPARTMENT OF AGRICULTURE,
"OFFICE OF THE SECRETARY,
"*Washington, D. C., April 26, 1904.*

"Pursuant to the authority conferred by the act of Congress of February 2, 1903, and in further-

ance of section 8 of the regulations of March 10, 1903 (B. A. I., Order No. 106), and in consequence of the existence of foot-and-mouth disease among animals in continental Europe—

"*It is hereby ordered*, That on account of the danger to the live-stock industry of the United States through the introduction of foot-and-mouth disease by means of the contagion being carried upon straw and hay, the importation of straw and hay, the product of any country of continental Europe or which has been transported through any of said countries, be prohibited: *Provided*, That this order shall not be construed to forbid the loading upon any vessel carrying animals from said countries for importation in the United States of a sufficient quantity of hay and straw for food and bedding for such animals, said hay and straw being the product of a country not affected by this order.

(Signed) "JAMES WILSON,
"*Secretary*."

The act of February 2, 1903 (32 Stat., 791), entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," provides (sec. 1):

"That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled

'An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' approved May twenty-ninth, eighteen hundred and eighty-four (twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot and mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the

United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

"SEC. 2. *That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia, whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.*

"SEC. 3. That any person, company, or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

Sections 4 and 5 of the act of May 29, 1884 (23 Stat., 31), referred to in the first section of the above act, are as follows:

"SEC. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigation may require.

"SEC. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

The act of March 3, 1903 (32 Stat., 1147, 1165), making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1904, provides:

"Emergency appropriation: To enable the Secretary of Agriculture to stamp out and eradicate the foot-and-mouth disease and other contagious diseases of animals * * * five hundred thousand dollars."

This legislation undoubtedly indicates an earnest purpose on the part of Congress to suppress, and,

if possible, eradicate the foot-and-mouth and other contagious, infectious, and communicable diseases of animals, and for the accomplishment of that purpose to provide the Secretary of Agriculture with ample authority and the most abundant means.

It is fundamental in Anglo-Saxon jurisprudence, however, that legislative power can not be delegated. In *Field* v. *Clark* (143 U. S., 649–692), Mr. Justice Harlan, speaking for the court, said:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

It follows, therefore, that the first clause of section 2 of the act of February 2, 1903, which authorizes the Secretary of Agriculture "to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious or communicable disease of animals," etc., must be construed to mean simply that he may make such regulations and take such measures, in his discretion, for the purpose mentioned, as are *administrative* in their nature—that is, for the enforcement of existing law. It is not to be assumed that Congress intended to exceed its constitutional authority and delegate to him legislative power. The well-settled rule is that an act of Congress should, if possible, be given an interpretation that will make it consistent with the Constitution. (*Parsons* v. *Bedford*, 3 Pet., 448; *Presser* v. *Illinois*, 116 U. S., 269; *Hooper* v. *California*, 155 U. S., 657.)

It requires no argument to show that a prohibition upon importation is a regulation of commerce with foreign nations. The power to regulate such commerce is committed by the Constitution to Congress. Unquestionably it is legislative power, and hence can only be exercised by Congress. It follows, therefore, that since a prohibition upon importation is not made or directed by the legislation referred to as a means for preventing the introduction and dissemination of the diseases of animals, the order of your Department prohibiting the importation of hay and straw from continental Europe is an exercise of legislative power and void.

In *Field* v. *Clark*, above cited, and also in the recent case of *Buttfield* v. *Stranahan* (192 U. S., 470), the distinction between legislative and executive or administrative action in regard to foreign commerce was pointed out.

In *Field* v. *Clark* it appeared that the tariff act of October 1, 1890, authorized and directed the President to suspend the free introduction of certain articles of commerce so often as he was satisfied that the government of any country producing them, or any of them, was imposing duties or other exactions upon the agricultural or other products of the United States which, in view of the free introduction of such articles authorized by the act, he might deem to be reciprocally unequal and unreasonable. In reply to the contention that this was a delegation of legislative power to the President, the court said (143 U. S., 693):

"Legislative power was exercised when Congress declared that the suspension should take place upon a named contingency. What the President was required to do was simply in execution

of the act of Congress. It was not the making of law. He was the mere agent of the law-making power to ascertain and declare the event upon which its expressed will was to take effect."

In *Buttfield* v. *Stranahan* the doctrine of *Field* v. *Clark* was applied. By section 1 of the act of March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea," Congress declared it unlawful, from and after a certain date, for "any person or persons or corporations to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 3 provided that the Secretary of the Treasury, upon the recommendation of the board of tea experts authorized to be appointed by the second section of the act, should "fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of tea imported into the United States."

It was contended in that case that the statute committed to the Secretary of the Treasury the determination of what teas might be imported, and therefore in effect vested that official with legislative power. But the court held that contention to be without merit, observing (192 U. S., 496):

"We are of opinion that the statute, when properly construed, * * * but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secre-

tary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. * * *

"We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

It will be observed that in both of the above cases the rule by which the commerce in question was to be regulated was laid down by Congress. In the first case it was specifically declared that the free importation of certain articles *should be suspended* upon a certain contingency, to be ascertained by the President; in the second, that it *should be unlawful* to import any merchandise or tea below the standards directed to be fixed by the Secretary of the Treasury. In the present case Congress has not made or directed a prohibition upon importation as a means for preventing the introduction or dissemination of animal contagion. So far as importation is concerned, it has simply authorized the Secretary of Agriculture "to seize, quarantine, and dispose of" certain articles coming from an infected foreign country. To hold, therefore, that under the authority given him "to make such regulations and take such measures as he may deem proper" to effectuate the purpose specified, he is authorized to lay a prohibition upon the importation of any article of commerce—and if upon any, upon all—is to say that

he has been authorized to make and not simply t
enforce the law. There can be no doubt that th
would be a delegation of legislative power. Ce
tainly it could not be said in such case, as was sa
by the Supreme Court of the legislation referred
in the above cases, that Congress had legislate
upon the subject as far as was reasonably pract
cable, since the present statute contains no int
mation whatever that a prohibition upon import
tion was contemplated.

So in regard to the navigable waters of the Unite
States, the power of Congress over which is para
mount and, when asserted, exclusive, it has bee
held that Congress, after declaring the substanti
law, may devolve upon executive officers the du
of determining certain facts involved in its admi
istration, such as whether a bridge is a materi
obstruction to navigation. (*Wisconsin* v. *Dulut*
96 U. S., 379; *Miller* v. *Mayor of New York*, 1
U. S., 385; *Lake Shore and Michigan Raiw ay*
Ohio, 165 U. S., 365.) In an opinion rendered th
Secretary of War July 15, 1904, this question
fully considered. (25 Opin., 194.)

It will also be observed that section 3 of the a
of February 2, 1903, makes a violation of its pr
visions "or the orders or regulations made
pursuance thereof" a misdemeanor, punishab
by fine and imprisonment. This provision mak
it all the more manifest that Congress could n
have intended, even if it were constitutional
within its power, to empower the Secretary
Agriculture to make regulations concerning ma
ters not referred to in the act.

In re Kollock (165 U. S., 526) is instructive
this connection as showing the distinction betwe

a regulation authorized by law and an unauthorized regulation. The oleomargarine act of August 2, 1886, required oleomargarine to be marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should prescribe, and authorized the Commissioner, with the approval of the Secretary, to make all needful regulations for carrying the act into effect. It was contended in that case that the statute was invalid because "it does not define what act done or omitted shall constitute a criminal offense," and delegates the power "to determine what acts shall be criminal" by leaving the stamps, marks, and brands to be defined by the Commissioner. But the court, speaking by Chief Justice Fuller, said (p. 533):

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not, and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged,

and that it is disposed of by previous decisions." (*United States* v. *Bailey*, 9 Pet., 238; *United States* v. *Eaton*, 144 U. S., 677; *Caha* v. *United States*, 152 U. S., 211.)

The distinction between that and the present case is apparent. The act of February 2, 1903, neither makes nor authorizes a prohibition upon importation as a means to prevent the introduction or spread of animal contagion. The order of your Department, therefore, prohibiting the importation of hay and straw from continental Europe itself first makes such importation an offense. The statute being silent on the subject, that order certainly can not be said to be be "a mere matter of executive detail" and "specifically authorized thereby in effectuation of the legislation which created the offense."

In an opinion rendered August 11, 1899 (22 Opin., 566), in which it was held that foreign-built vessels were not entitled to be registered under the laws of the United States, Attorney-General Griggs said:

"The regulation of commerce and navigation is a subject entirely within the control of Congress, and, except in accordance with such laws as have been passed by Congress upon this subject, no authority exists in the Executive Departments to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with commerce and navigation. Congress has specifically legislated upon the subject of the registry of vessels. Section 4132 of the Revised Statutes describes the vessels that are entitled to be registered in conformity to the directions of the subsequent sections of the same title. * * *

This is a positive and specific direction as to what vessels may be and what may not be registered."

It is to be observed that in the tariff acts, the execution of which is devolved upon the Secretary of the Treasury, Congress has specifically legislated upon the subject of importation. It is hardly to be assumed, therefore, in the absence of an express declaration to that effect, that in the act under consideration Congress intended to confer upon the head of another Department such extensive authority over that branch of foreign commerce as the order prohibiting the importation of hay and straw from continental Europe would imply.

As showing the intention of Congress by the legislation in question, it is instructive to observe that section 5 of the act of May 29, 1884 (referred to in the first section of the act of February 2, 1903), provides that "to prevent the *exportation* from any port of the United States to any port in a foreign country of *live stock* affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary." In this provision Congress specifically expresses its intention that live stock affected as described shall not be exported. The act of February 3, 1903, while indicating a general purpose on the part of Congress that the foot and mouth and other diseases of animals shall be suppressed or eradicated, contains no intimation that it intended to place or to authorize a prohibition upon the importation of any article of commerce as a means to that end.

The fact, to which my attention is particularly called, that the word "infected," which appears before the words "foreign country" in the second clause of section 2, does not appear before those words in the first clause, is of no importance, in view of the essential difference between the two clauses. The first clause, as already stated, merely authorizes the Secretary of Agriculture to make such regulations and take such measures, of an administrative nature, as he may deem proper to enforce existing law; while the second announces a rule of law in regard to the importation of certain articles which he is to enforce.

I am constrained, therefore, to hold that the order of your Department of April 28, 1904, prohibiting the importation of hay and straw from continental Europe is unauthorized by law.

Respectfully,

W. H. MOODY.

The SECRETARY OF AGRICULTURE.

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